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ANDREW CHUAH KHIM PEIK v. HLG CAPITAL BHD

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
MARY LIM JCA
HANIPAH FARIKULLAH JCA
B [CIVIL APPEAL NO: W-02(A)-2146-10-2017]
2 MAY 2019

LABOUR LAW: *Employment – Dismissal – High ranking employee – Industrial Court found dismissal of employee without just cause and excuse – Employer*
C *appealed to High Court – High Court quashed decision of Industrial Court – Employee appealed against High Court decision – Whether threshold to be satisfied by employer resisting claim for dismissal high – Whether industrial jurisprudence leaned towards employee – Whether cases of poor performance technical and required many issues to be considered – Whether finding fell into realm of Industrial Court*
D *– Whether High Court ought to be slow to intervene – Whether decision of Industrial Court ought not to be disturbed*

INDUSTRIAL COURT: *Award – Appeal against – Industrial Court found dismissal of employee without just cause and excuse – Employer appealed to High*
E *Court – High Court quashed decision of Industrial Court – Whether threshold to be satisfied by employer resisting claim for dismissal high – Whether industrial jurisprudence leaned towards employee – Whether cases of poor performance technical and required many issues to be considered – Whether finding fell into realm of Industrial Court – Whether High Court ought to be slow to intervene – Whether decision of Industrial Court ought not to be disturbed*

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The appellant, a high ranking employee of the respondent, appealed against the decision of the High Court Judge which quashed the decision of the Industrial Court. The appellant was the Group Financial Controller of the respondent. The respondent claimed that the appellant's performance had deteriorated over the subsequent years and that he had poor leadership skills
G and lacked competency and integrity. Thus, the respondent terminated the appellant. The appellant filed an action against the respondent at the Industrial Court. The Industrial Court held that the appellant's termination was without just cause or excuse and ordered the respondent to pay the appellant RM314,145.52. Dissatisfied, the respondent filed a judicial review
H application for an order of *certiorari* to quash the Industrial Court's decision. The High Court found that the Industrial Court had failed to take relevant considerations and had reached a decision that was perverse, justifying the quashing of the award. The appellant thus appealed against the decision of the High Court. The appellant submitted that (i) he had been summarily
I dismissed with no written warnings or reasonable indication of his alleged shortcomings; (ii) despite being awarded an opportunity to produce e-mails

as evidence of the appellant's poor performance, the respondent's main witness could not produce those e-mails; (iii) the respondent had merely given evidence of misunderstandings on work related matters raised by other employees who had grouses with the appellant; and (iv) there were no official complaints filed against the appellant. The appellant submitted that, on the contrary, he had received good bonuses, increments and comments for his appraisals during his probation and the final appraisal for his confirmation. Therefore, the appellant prayed that the appeal be allowed.

Held (allowing appeal)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) It is well established that the industrial jurisprudence leaned towards the employee and the threshold to be satisfied by the employer to resist a claim for dismissal without just cause and excuse was high. In cases of poor performance, it may become very technical and many issues may have to be considered and generally may also relate to market force and economic situation *etc.* (para 7)

(2) In cases of poor performance by an employee holding senior management level, the threshold is hybrid in nature and depends on the facts and circumstances of the case and falls within the realm of the Industrial Court itself to decide, taking into consideration just and equitable considerations as envisaged in the Industrial Relations Act 1967. (para 7)

(3) When the finding falls into the realm of the Industrial Court and the Industrial Court had taken into consideration all the facts related to the dismissal, the High Court should be slow to intervene and quash the decision. The facts in this appeal amply met that threshold and the High Court fell into error in intervening on quashing the decision of the Industrial Court. The decision of the Industrial Court ought not to have been disturbed. (paras 7 & 8)

Bahasa Malaysia *Headnotes*

Perayu, seorang pegawai berjawatan tinggi responden, merayu terhadap keputusan Hakim Mahkamah Tinggi membatalkan keputusan Mahkamah Perusahaan. Perayu adalah Pengawal Kewangan Berkumpulan responden. Responden mendakwa bahawa prestasi perayu telah merosot sepanjang tahun-tahun berikutnya dan bahawa perayu tidak mempunyai kemahiran kepimpinan dan kekurangan kecekapan dan integriti. Oleh itu, responden telah memecat perayu. Perayu memfailkan guaman terhadap responden di Mahkamah Perusahaan. Mahkamah Perusahaan memutuskan pemecatan perayu adalah tanpa sebab dan alasan adil dan memerintahkan responden membayar perayu sejumlah RM314,145,52. Tidak berpuas hati, responden memfailkan permohonan semakan kehakiman untuk perintah *certiorari* untuk membatalkan keputusan Mahkamah Perusahaan. Mahkamah Tinggi

mendapati Mahkamah Perusahaan gagal mengambil pertimbangan-pertimbangan relevan dan mencapai keputusan yang tidak munasabah, menjustifikasikan pembatalan award. Perayu oleh itu merayu terhadap keputusan Mahkamah Tinggi. Perayu menghujahkan (i) dia telah dipecat tanpa apa-apa amaran bertulis atau diberi petunjuk munasabah berkaitan kelemahan-kelemahannya yang didakwa; (ii) walaupun diberi peluang untuk mengemukakan e-mel-e-mel sebagai bukti bahawa prestasi perayu merosot, saksi utama responden tidak dapat mengemukakan e-mel-e-mel itu; (iii) responden hanya memberikan keterangan berkenaan terdapat perselisihan faham tentang perkara-perkara kerja yang dibangkitkan oleh pekerja-pekerja lain yang tidak berpuas hati dengan perayu; dan (iv) tiada aduan rasmi telah difailkan terhadap perayu. Perayu menghujahkan bahawa, sebaliknya, dia telah menerima bonus, kenaikan gaji dan komen-komen yang baik untuk penilaiannya semasa percubaan dan penilaian muktamad untuk pengesahannya. Oleh itu, perayu merayu supaya rayuan ini dibenarkan.

Diputuskan (membenarkan rayuan)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Adalah mantap bahawa perundangan perusahaan memihak lebih kepada pekerja dan ambang yang perlu dipenuhi oleh majikan untuk menentang tuntutan pemecatan tanpa sebab dan alasan adil adalah tinggi. Dalam kes-kes kemerosotan prestasi kerja, ini mungkin teknikal dan pelbagai isu-isu harus diambil kira dan secara am mungkin berhubungan kuasa pasaran dan keadaan ekonomi.

(2) Dalam kes-kes kemerosotan prestasi pekerja, yang memegang tahap pengurusan yang tinggi, ambang adalah bersifat hibrid dan bergantung pada fakta-fakta dan keadaan kes dan adalah terangkum dalam bidang Mahkamah Perusahaan untuk memutuskan, mengambil kira pertimbangan adil dan saksama seperti yang dibayangkan oleh Akta Perhubungan Perusahaan 1967.

(3) Apabila dapatan terangkum dalam bidang Mahkamah Perusahaan dan Mahkamah Perusahaan telah mengambil kira segala fakta berhubungan pemecatan, Mahkamah Tinggi tidak wajar campur tangan dan membatalkan keputusan. Fakta-fakta dalam rayuan ini memenuhi ambang dan Mahkamah Tinggi terkhilaf apabila campur tangan untuk membatalkan keputusan Mahkamah Perusahaan. Keputusan Mahkamah Perusahaan tidak sepatutnya diganggu.

Case(s) referred to:
Alidar Ltd v. Taylor [1978] ICR 445 ***(refd)***
Bayer (M) Sdn Bhd v. Ng Hong Pau [1999] 4 CLJ 155 CA ***(refd)***
Bennett Subash Peter v. Bon Ton Sdn Bhd (Bon Ton Resort Langkawi) [2019] 4 CLJ 150 CA ***(refd)***
Burswood Resort (Management) Limited v. Yeap Peng Huat [2007] 2 LNS 2222 ***(refd)***
Calvin v. Carr & Ors [1979] 2 All ER 440 ***(refd)***

Chapman & Others v. Goonvean & Rostawvack China Clay Co Ltd [1983] 2 All ER ***(refd)***
Choong Poh Ling lwn. CIMB Aviva Assurance Berhad [2016] 2 LNS 1032 ***(refd)***
Cox v. Philips Industries Ltd [1976] 1 WLR 638 ***(refd)***
Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***
Hewlett Packard (M) Sdn Bhd v. Loh Choon Aim [1993] 1 ILR 308B ***(refd)***
Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC ***(refd)***
Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***
Ireka Construction Bhd v. Chantiravathan Subramaniam James [1995] 2 ILR 11 ***(refd)***
James v. Waltham Holy Cross UDC [1973] ICR 398 ***(refd)***
K Kanagam Kannoo v. Sime Darby Plantation Bhd/Ladang Bukit Pilah [2018] 2 LNS 1567 ***(refd)***
Lam Yue Choong v. F&N Dairies (M) Sdn Bhd [2005] 2 LNS 1832 ***(refd)***
Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***
Malayan Banking Bhd v. Association of Bank Officers, Peninsular Malaysia & Anor [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 SC ***(refd)***
MCI WorldCom Malaysia Sdn Bhd v. Sultan Askin Mydin Meera [2007] 2 LNS 2267 ***(refd)***
Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam [2006] 2 CLJ 501 CA ***(refd)***
Noor Azarina Alias v. Serasi Medik Sdn Bhd [2018] 2 LNS 1776 ***(refd)***
Omni Precision Sdn Bhd v. Tan Boon Leong [2006] 2 LNS 0922 ***(refd)***
Pearce v. Foster [1886-90] All ER Rep Ext 1752 ***(refd)***
Peter David Jackson v. AON Insurance Brokers (M) Sdn Bhd (08-225-05-2017) (Unreported) ***(refd)***
Peter David Jackson v. AON Insurance Brokers (M) Sdn Bhd [2015] 1 ILR 515 ***(refd)***
Peter David Jackson v. AON Insurance Brokers B(M) Sdn (R2-25-77-05-2015) (Unreported) ***(refd)***
Petroliam Nasional Bhd v. Nik Ramli Nik Hassan [2003] 4 CLJ 625 FC ***(refd)***
Premkumar Vijayakumaran v. UMW Toyota Motor Sdn Bhd [2018] 2 LNS 2124 ***(refd)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***
Razali Husain v. Sapura Research Sdn Bhd & Anor [2016] 1 LNS 1640 HC ***(refd)***
Robert John Reeves v. Menteri Sumber Manusia, Malaysia & Anor [2000] 1 CLJ 180 HC ***(refd)***
Robert John Reeves v. Menteri Sumber Manusia, Malaysia & Anor [2007] 4 CLJ 318 CA ***(refd)***
Roslan Baba v. Puncak Niaga (M) Sdn Bhd [2013] 3 ILR 216 ***(refd)***
Shanmugam Maramuthu v. A Hartodt Ocean Services (M) Sdn Bhd [2018] 4 ILR 106 ***(refd)***
Swedish Motor Assemblies Sdn Bhd v. Hj Md Ison Baba [1998] 3 CLJ 288 CA ***(refd)***
Tan Cheng Leng v. Tropicana Medical Centre (M) Sdn Bhd [2017] 1 ILR 383 ***(refd)***
Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 3 CLJ 314 CA ***(refd)***
United Plantation Bhd v. Ahmad Zaini Mohamed Tahir [1996] 1 ILR 632 ***(refd)***
Waite v. Government Communications Headquarters [1983] ICR 653 ***(refd)***
Waite v. Government Communications Headquarters [1983] IRLR 341 ***(refd)***

Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC ***(refd)***

Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 FC ***(refd)***

For the appellant - Balan S Nair & Elaina Teng Xue Er; M/s Seah Balan Ravi & Co
For the respondent - Sivabalah Nadarajah & Reena Enbasegaram; M/s Shearn Delamore & Co

[Editor's note: For the High Court judgment, please see HLG Capital Bhd v. Andrew Chuah Khim Peik [2019] 8 CLJ 817 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant, a high ranking employee of the respondent, appeals against the decision of the High Court Judge which quashed the decision of the Industrial Court which had ruled that the appellant was dismissed without just cause and excuse.

[2] The appellant and the respondent relied on the following cases: (i) *Robert John Reeves v. Menteri Sumber Manusia, Malaysia & Anor* [2007] 4 CLJ 318; [2007] 1 MELR 13 (CA); (ii) *Lee Kwan Woh v. PP* [2009] 5 CLJ 631 (FC); (iii) *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665; [1996] 1 MELR 142; (iv) *Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 2 CLJ 501; (v) *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; (vi) *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; (vii) *Razali Husain v. Sapura Research Sdn Bhd & Ano*r [2016] 1 LNS 1640; [2016] MLRHU 1465; (viii) *Petroliam Nasional Bhd v. Nik Ramli Nik Hassan* [2003] 4 CLJ 625; (ix) *Robert John Reeves v. Menteri Sumber Manusia, Malaysia & Anor* [2000] 1 CLJ 180; (x) *James v. Waltham Holy Cross UDC* [1973] ICR 398; (xi) *Ireka Construction Bhd v. Chantiravathan Subramaniam James* [1995] 2 ILR 11; (xii) *Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298; (xiii) *Cox v. Philips Industries Ltd* [1976] 1 WLR 638; (xiv) *Calvin v. Carr & Ors* [1979] 2 All ER 440; (xv) *Bayer (M) Sdn Bhd v. Ng Hong Pau* [1999] 4 CLJ 155; (xvi) *Chapman & Others v. Goonvean & Rostawvack China Clay Co Ltd* [1983] 2 All ER; (xvii) *Pearce v. Foster* [1886-90] All ER Rep Ext 1752; (xviii) *Premkumar Vijayakumaran v. UMW Toyota Motor Sdn Bhd* [2018] 2 LNS 2124; (xix) *Noor Azarina Alias v. Serasi Medik Sdn Bhd* [2018] 2 LNS 1776; (xx) *Shanmugam Maramuthu v. A Hartodt Ocean Services (M) Sdn Bhd* [2018] 4 ILR 106; (xxi) *K Kanagam Kannoo v. Sime Darby Plantation Bhd/Ladang Bukit Pilah* [2018] 2 LNS 1567; (xxii) *Peter David Jackson v. AON Insurance Brokers (M) Sdn Bhd* [2015] 1 ILR 515; [2015] 2 LNS 1567; (xxiii) *Waite v. Government Communications*

Headquarters [1983] IRLR 341; (xxiv) *Waite v. Government Communications Headquarters* [1983] ICR 653; (xxv) *Peter David Jackson v. AON Insurance Brokers B(M) Sdn* [R2-25-77-05-2015]; (xxvi) *Peter David Jackson v. AON Insurance Brokers (M) Sdn Bhd* [08-225- 05/2017 (FC)]; (xxvii) *Hewlett Packard (M) Sdn Bhd v. Loh Choon Aim* [1993] 1 ILR 308B; (xxviii) *United Plantation Bhd v. Ahmad Zaini Mohamed Tahir* [1996] 1 ILR 632; (xxix) *Alidar Ltd v. Taylor* [1978] ICR 445; (xxx) *Choong Poh Ling lwn. CIMB Aviva Assurance Berhad* [2016] 2 LNS 1032; (xxxi) *Tan Cheng Leng v. Tropicana Medical Centre (M) Sdn Bhd* [2017] 1 ILR 383; (xxxii) *MCI WorldCom Malaysia Sdn Bhd v. Sultan Askin Mydin Meera* [2007] 2 LNS 2267; (xxxiii) *Burswood Resort (Management) Limited v. Yeap Peng Huat* [2007] 2 LNS 2222; (xxxiv) *Lam Yue Choong v. F&N Dairies (M) Sdn Bhd* [2005] 2 LNS 1832; (xxxv) *Roslan Baba v. Puncak Niaga (M) Sdn Bhd* [2013] 3 ILR 216; (xxxvi) *Omni Precision Sdn Bhd v. Tan Boon Leong* [2006] 2 LNS 0922; (xxxvii) *Robert John Reaves v. Menteri Sumber Manusia & Anor* [2000] 1 CLJ 180; (xxxviii) *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314; (xxxix) *Swedish Motor Assemblies Sdn Bhd v. Hj Md Ison Baba* [1998] 3 CLJ 288; (xl) *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159; (xli) *Malayan Banking Bhd v. Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183; [1988] 3 MLJ 204; (xlii) *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344; [1995] 2 MLJ 753; (xliii) *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687.

Brief Facts And Grounds Of Decision

[3] The brief facts of the case and the grounds of decision placed in a rudimentary manner is repeated to save court's time and it reads as follows:

Brief facts

1. The defendant/appellant/D1 was the Group Financial Controller of the plaintiff/respondent/P1. D1's employment with P1 was confirmed on 31.7.2006.

2. P1 claimed that: D1's performance deteriorated over the subsequent years. D1 has poor leadership skills and lack of competency and integrity. In 2009, P1 no longer repose the necessary trust to D1 and terminated D1 *via* letter dated 17.6.2009 for immediate termination.

3. D1 then filed an action against P1 in the Industrial Court/IC. IC held that D1's termination was without just cause or excuse and ordered P1 to pay D1 RM314,145.52. Dissatisfied, P1 filed this Judicial Review for an order for *Certiorari* to quash IC's decision. No warning was given to D1. No opportunity was given for D1 to improve. No formal assessment of employee was conducted.

4. IC had erred in law or acted outside its jurisdiction by applying the wrong test/legal principles, by failing to take relevant matters into consideration, by taking into account irrelevant matters and by

arriving at unreasonable/perverse decision. Since D1 was employed by P1, D1 had not been subjected to any appraisal except those carried out for purpose of D1's confirmation. D1 has been counseled several times by the Human Resources. No bonus given to D1 in 2007 should reflect P1's dissatisfaction with D1's performance.

5. P1 prayed for an order of *Certiorari* to quash IC's award. Costs and other suitable relief.

6. D1 stated that: the increment and bonuses were not given despite no appraisal being conducted. No complaint received that D1 had bad leadership skills and lack of competency and integrity. This claim was not proven before IC. D1 had a problem with his 2 superiors because D1 refused to heed to their request for certain payments which were not in compliance with P1's Financial Instruction. IC even found that there was absolutely no evidence of D1's poor performance. P1 as a bank should have complied with the procedures issued by the Securities Commission and Bank Negara Malaysia.

7. The letter of termination was the first notice given to D1 on the dissatisfaction of D1's performance without any show cause letter or warning or reprimand of any sort or even a counselling session. The letter of termination came as a huge surprise to D1. D1 was not given any opportunity to answer the charges as there was no domestic inquiry done at all. IC had not erred in coming to its decision. This Judicial Review is an appeal in disguise. All these issues have been canvassed before IC.

8. High Court: P1's OS for Judicial Review is allowed with costs of RM5000.

Grounds of Decision of High Court (YA Datuk Hajjah Azizah Binti Hj Nawawi)

1. The HCJ found that the Industrial Court had applied the wrong test in this case. The Industrial Court had applied the general test to prove poor performance of the employees.

2. The HCJ found that the Industrial Court has made an error in law in applying the general test to a senior management employee. The test to be applied is that it is sufficient for the Company to establish that the upper management of the company, in the absence of bad faith, was dissatisfied with employee in question and that the same had been brought to his attention.

3. The HCJ found that the Industrial Court has failed to take into consideration the evidence of the Company's witnesses, that the company's top management had lost confidence in the Respondent to continue to lead the financial aspect of the group.

4. The HCJ held that the Industrial Court's finding is against the evidence before the Industrial Court that the Company's dissatisfaction with the Respondent is *bona fide*.

5. The HCJ found that the Industrial Court had failed to take relevant considerations and had reached a decision that is perverse, which justifies the quashing of the Award.

[4] The memorandum of appeal of the appellant reads as follows:

1. Hakim yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila membuat keputusan untuk membenarkan rayuan Pemohon dengan kos;

2. Hakim yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila gagal untuk membuat penilaian yang terperinci secara sepenuhnya terhadap afidavit-afidavit dan keterangan yang difailkan oleh Responden.

3. Hakim yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila gagal mengambil kira keterangan yang relevan.

4. Hakim yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila mengambil kira keterangan yang tidak relevan.

5. Hakim yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila gagal mengambil kira bahawa terdapat prosedur dalaman yang tertentu yang patut diikuti bagi penilaian ('appraisal') Perayu yang tidak dipatuhi oleh Responden.

6. Hakim yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila gagal mengambil kira bahawa Perayu tidak diberi apa-apa amaran secara bertulis dan/atau lisan berkenaan dengan prestasinya.

7. Hakim yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila gagal mengambil kira bahawa kegagalan Responden untuk memberi bonus dan/atau kenaikan gaji tidak mencukupi untuk menunjukkan bahawa responden tidak berpuas hati dengan prestasi Perayu dalam keadaan ('in the circumstances').

8. Hakim yang bijaksana telah khilaf dari segi undang-undang dan fakta apabila memutuskan bahawa Presiden Mahkamah Perusahaan telah khilaf dalam keputusannya.

[5] The appellant's executive summary reads as follows:

1. The Appellant is appealing against the decision of the learned High Court judge, Yang Arif Datin Hajjah Azizah binti Nawawi, in allowing the Respondent's application for judicial review against the Award of the Industrial Court Award No: 805 Tahun 2016.

2. In brief, the Appellant was appointed as Group Financial Controller of the Respondent. However, on 18.06.2009 by way of a letter dated 17.06.2009, the Appellant was summarily dismissed on the ground of his alleged poor performance. This was despite the fact that no written warnings or reasonable indication was given to the Appellant of his alleged shortcomings.

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3. Further, despite being awarded an opportunity to produce emails as evidence of the Appellant's poor performance, the Respondent's main witness and the Appellant's superior, Chew Seong Aun, could not produce those emails.

4. The Appellant contends that the application for judicial review should not have been allowed on the grounds that the learned Chairman's decision was not grounded on illegality or plain irrationality and thus the finding of the Industrial Court should not have been quashed.

5. The Respondent had contended that in view that the Appellant was a high ranking employee, the Appellant, despite not being issued written warnings, should have known that the Respondent was not satisfied with his performance. However, the Appellant contends that the dissatisfaction with his performance must be obvious and/ or clear enough that the Appellant would be aware of the same. This was clearly not the case as the Appellant was caught completely off guard.

6. The Respondent had merely given evidence of misunderstandings on work- related matters raised by one David Lim, Muhammad Awi Goo and Mohamed Azlan bin Alias, all of who were from the Securities Division of the Respondent and had grouses with the Appellant. Evidence was produced by the Appellant that his strictness in carrying out his job was necessary in light of the action taken against David Lim, Muhammad Awi Goo and Mohamed Azlan bin Alias by the public supervisory bodies. It must be noted that there were no official complaints filed against the Appellant.

7. The Appellant's superior, Chew Seong Aun, had also failed to carry out an appraisal as per the procedure and policy of the Respondent (as confirmed by Chin Jeck Leng - the Respondent's HR Manager). On the contrary, he had argued that he carried out the appraisal in his own way. The Appellant submits that in light of policies determined by the Respondent, Chew Seong Aun's evidence that he had carried out the appraisal in his own way, cannot be justified.

8. If at all there was dissatisfaction by the Respondent, the Appellant would have had at the very least been made aware through the appraisal. However, this was clearly not done and the Respondent cannot be allowed to contend that sufficient notice was given to the Appellant of his alleged poor performance or that the Appellant should have known of the dissatisfaction of the Respondent with his performance.

9. On the contrary, the Appellant had received good bonuses, increments and comments for his appraisals during his probation and the final appraisal for confirmation.

10. Based on the Appellant's submission, the Appellant submits that the learned Chairman of the Industrial Court had not acted illegally or was plainly irrational and had considered all relevant evidence and

principles when she decided in favour of the Appellant. As such the learned High Court judge erred in law and in fact when Her Ladyship allowed the application for judicial review.

11. Therefore, the Appellant prays that the appeal be allowed with costs.

[6] The respondent's memorandum of appeal in the High Court reads as follows:

3. Alasan-alasan yang mana relief tersebut dipohon telah dinyatakan sepenuhnya dalam Afidavit Lim Man Hou yang diikrarkan pada 5.10.2016 untuk menyokong Permohonan Untuk Semakan Kehakiman berhubung dengannya yang mana Pernyataan ini difailkan tetapi alasan-alasan itu dengan ringkasnya adalah bahawa:

3.1. Mahkamah Perusahaan telah melakukan kesilapan undang-undang yang material berikut dan/atau bertindak di luar bidang kuasanya apabila memutuskan yang penamatan perkhidmatan Responden atas sebab prestasi yang lemah, adalah tanpa sebab atau alasan yang munasabah, kerana Mahkamah Perusahaan telah,

(a) menerapkan ujian yang salah / salah menerapkan prinsip undang-undang;

(b) gagal mengambil kira perkara relevan;

(c) mengambil kira perkara tidak relevan; dan

(d) mencapai keputusan yang begitu bertentangan dan tidak munasabah hinggakan tiada tribunal yang munasabah dalam keadaan yang sama akan mencapai keputusan demikian.

3.2. Mahkamah Perusahaan terkhilaf dari awal lagi ("from the outset") apabila Mahkamah Perusahaan gagal menerapkan pertimbangan relevan berikut apabila menentukan sama ada penamatan perkhidmatan atas alasan prestasi yang lemah adalah dengan sebab atau alasan yang munasabah,

(a) sama ada majikan tidak berpuas hati dengan prestasi pekerja;

(b) sama ada keterangan telah dikemukakan untuk membuktikan perasaan tidak puas hati majikan;

(c) bahawa Mahkamah Perusahaan tidak boleh menggantikan pandangan /penilaian subjektif majikan dengan dapatannya sendiri;

(d) bahawa berhubung dengan pekerja berjawatan tinggi, cukuplah jika majikan membuktikan bahawa pihak pengurusan kanan - tanpa niat jahat - tidak berpuas hati dengan pekerja dan bahawa perkara ini telah dibawa kepada perhatiannya. Amaran bertulis tidak perlu bagi pekerja berjawatan tinggi;

(e) sama ada majikan telah memberi peluang kepada pekerja untuk membaiki prestasinya.

A

3.3. Mahkamah Perusahaan terkhilaf dari segi undang-undang apabila terlalu menitikberatkan tentang sama ada penilaian rasmi telah dijalankan.

3.4. Mahkamah Perusahaan terkhilaf di sisi undang-undang apabila bergantung kepada ketiadaan penilaian prestasi untuk memutuskan bahawa penamatan perkhidmatan Responden adalah tidak adil, dan dengan berbuat demikian, telah gagal mengambil kira faktor-faktor relevan berikut,

B

(a) kewajipannya untuk menerapkan Seksyen 30(5) Akta Perhubungan Perusahaan 1967 yang dengan nyata memperuntukkan bahawa Mahkamah Perusahaan hendaklah, "act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form".

C

(b) tidak ada obligasi undang-undang atau statutori yang dikenakan terhadap majikan untuk menjalankan penilaian rasmi terhadap pekerjanya.

D

(c) matlamat untuk mengadakan penilaian rasmi adalah untuk menentukan bonus dan/atau kenaikan gaji untuk diberikan kepada pekerja yang berkenaan.

E

(d) peranan Mahkamah Perusahaan adalah untuk membuat keputusannya berdasarkan keterangan lisan dan/atau berdokumen yang dikemukakan di hadapannya, serta untuk menentukan pertimbangan yang perlu diberikan kepada apa-apa keterangan dan sama ada untuk menerimanya atau mengenepikannya.

F

(e) meskipun jika terdapat keperluan di pihak majikan untuk mengadakan penilaian, kegagalan majikan untuk berbuat demikian tidak mungkin menyebabkan pembuangan kerja yang sebaliknya adil, menjadi tidak adil. Apa-apa kecacatan atau pelanggaran keadilan asasi di pihak majikan boleh diubati oleh Mahkamah Perusahaan dengan mendengar perkara tersebut *de novo*.

G

3.5. Mahkamah Perusahaan melakukan kesilapan undang-undang apabila mencapai kesimpulan bahawa penilaian dikatakan perlu untuk menilai prestasi Responden, apabila,

H

(a) gagal mengambilkira perkara relevan keterangan yang tidak dipertikaikan bahawa sepanjang tempoh pekerjaannya dengan Pemohon, Responden tidak menjalani sebarang penilaian, kecuali yang dilakukan bagi tujuan pengesahan pekerjaannya.

I

(b) gagal mengambilkira perkara relevan keterangan Chew Seong Aun (dirujuk sebagai COW1 semasa presiding di hadapan Mahkamah Perusahaan dan yang pernyataan saksinya ditanda sebagai COWS-1"), iaitu pegawai atasan terdekat Responden, bahawa Pemohon tidak mempunyai dasar yang menghendaki

penilaian rasmi dijalankan berhubung dengan pengurusan kanannya. Chew Seong Aun tersebut adalah Ketua Pegawai Kewangan Hong Leong Financial Group Berhad yang mana Pemohon adalah anak syarikatnya.

(c) mengambil kira penegasan tidak relevan oleh Chin Jeck Leng, yang memegang jawatan yang jauh lebih rendah (jika dibandingkan dengan jawatan dan gred Responden dan struktur gred kumpulan syarikat Hong Leong secara keseluruhan), yang hanya mula bekerja dengan Pemohon pada bulan April 2007, dan yang tidak terlibat dalam penilaian pekerja berjawatan tinggi termasuk Responden.

3.6. Mahkamah Perusahaan melakukan kesilapan undang-undang apabila mencapai kesimpulan di muka surat 14 dan 15 Award tersebut, bahawa, "... the idea that the Claimant was a poor performer was not one seen and experienced by COW1 on a first hand basis. Instead he had also listened to rumours, i.e. what the Claimant's peers and subordinates said to him about the Claimant, and what a few senior managers had complained to him. At most the charges against the Claimant were made as an afterthought because of such complaints by a few senior management people (mentioned in detail hereafter) and their obvious dislike of the Claimant for the manner in which he carried out his tasks as the Group Financial Controller. COW 1 relied on what was told to him by others", dan di muka surat 19 Award tersebut, bahawa, "Even if we looked at the letter of termination ... the reasons given for the Claimant's dismissal, do not bear out to be substantive reasons at all. There were worded in such general and vague terms that no reasonable employee placed in the same position as the Claimant could have understood and replied to them", kerana gagal,

(a) menghayati secara kehakiman unsur subjektif apabila menilai prestasi pekerja dan prerogative majikan dalam hal ini.

(b) mengambil kira faktor relevan bahawa keterangan dokumentari dan juga lisan telah dikemukakan mengenai pelbagai contoh kelemahan Responden sebagai Pengawal Kewangan Kumpulan, dari segi kemahiran pengurusan insannya semasa berurusan dengan orang bawahannya dan dari segi ketidakcekapannya dan ketiadaan kerjasama apabila berurusan dengan rakan sejawatnya dan jabatan lain.

(c) mengambil kira bahawa semasa pemeriksaan balasnya, Chew Seong Aun telah mengesahkan, "At the end of the day, I'm aware of his output and I would judge it myself".

(d) mengambil kira/tidak mengendahkan keterangan lisan dan berdokumen yang dikemukakan oleh Chew Seong Aun mengenai perasaan tidak puas hatinya dengan prestasi Responden sebagai Pengawal Kewangan Kumpulan.

(e) mengambil kira/tidak mengendahkan keterangan lisan dan berdokumen yang dikemukakan oleh Muhammad Awi Goo (Ketua Operasi Syarikat pada masa itu yang dirujuk sebagai 'COW-2' semasa prosiding di hadapan Mahkamah Perusahaan dan yang pernyataan saksinya ditanda sebagai COWS-2), mengenai ketidakupayaan Responden untuk memahami sistem perakaunan dan operasi, menyediakan penyelesaian dan menyelesaikan masalah.

(f) mengambil kira/tidak mengendahkan keterangan lisan dan berdokumen oleh Low Fei Fei (Pengurus Kewangan Syarikat pada masa itu yang dirujuk sebagai 'COW-3' semasa prosiding di hadapan Mahkamah Perusahaan dan yang penyataan saksinya ditanda sebagai COWS-3), berkenaan Responden tidak mempunyai kemahiran pengurusan insan dan kepimpinan.

(g) mengambil kira/tidak mengendahkan keterangan lisan dan berdokumen yang dikemukakan oleh Mohammad Azlan bin Alias (Ketua Urus Niaga, Gred M1 pada masa itu yang dirujuk sebagai 'COW-4' semasa prosiding di hadapan Mahkamah Perusahaan dan yang pernyataan saksinya ditanda sebagai COWS-4), mengenai Rcsponden tidak bekerjasama dan tidak berupaya memberi sokongan kepada rakan sejawatnya/jabatan lain.

(h) mengambil kira/tidak mengendahkan keterangan dokumentari oleh David Lim Meng Hoe (Ketua Pegawai Operasi HLG Securities Sdn Bhd pada masa itu) yang menghuraikan kekecewaannya ("frustration") apabila berurusan dengan Responden.

3.7. Mahkamah Perusahaan terkhilaf dari segi undang-undang apabila menyimpang daripada prinsip yang sudah mantap bahawa amaran bertulis tidak perlu bagi kakitangan berjawatan tinggi, apabila membuat kesimpulan di muka surat 17, 18 dan 19 Award tersebut, bahawa, "The law with regard to proof that proper procedures must be followed in cases of poor performance, and where there must be sufficient written communications to the claimant on it established and very clear in its requirements".

3.8. Mahkamah Perusahaan terkhilaf disisi undang-undang apabila membuat kesimpulan yang kelemahan Responden tidak dimaklumkan kepadanya kerana Mahkamah Perusahaan gagal mengambil kira faktor-faktor relevan bcrikut:

(a) keterangan Chew Seong Aun bahawa dia telah beberapa kali memberi kaunseling kepada Responden sama ada dengan sendiri dan juga dengan kakitangan daripada Sumber Manusia.

(b) e-mel Responden sendiri bertarikh 15.12.2008 bahawa dia tidak menerima apa-apa bonus dan mengakui, "Seong Aun called me in for meeting thereafter on the EPF issue and at the same time further accused me of not being able to get along with Teo and Fei Fei ...".

(c) surat bonus/kenaikan gaji bertarikh 14.12.2007 di mana kenaikan gaji Responden hanyalah 3.6%, iaitu lebih rendah daripada kadar kenaikan gaji purata sebanyak 4.8%, dan Responden hanya diberikan bonus 3 bulan iaitu lebih rendah daripada pembayaran bonus purata sebanyak 6.5 bulan, mencerminkan perasaan tidak puas hati Pemohon dengan Responden, yang sepatutnya disedari oleh Responden.

(d) Responden memang mengetahui tentang perasaan tidak puas hati Pemohon memandangkan surat bonus/kenaikan gaji bertarikh 15.12.2008 yang memaklumkan Responden bahawa dia tidak akan menerima sebarang bonus dan sebarang kenaikan gaji untuk tahun 2009.

4. Pada pendengaran Permohonan untuk Semakan Kehakiman, Pemohon akan bergantung kepada alasan-alasan yang dinyatakan dengan panjang lebar dalam Afidavit LIM MUN HOU yang diikrarkan pada 5.10.2016 dan difailkan di sini untuk menyokongnya.

[7] We have read the appeal records and the able submissions of the parties. We have taken some time to consider the authorities by the parties. After much consideration, we take the view that the appeal must be allowed. Our reasons *inter alia* are as follows:

(i) It is well-established that the industrial jurisprudence leans towards the employee and the threshold to be satisfied by the employer to resist a claim for dismissal without just cause and excuse is high. In *Bennett Subash Peter v. Bon Ton Sdn Bhd (Bon Ton Resort Langkawi)* [2019] 4 CLJ 150; [2019] 1 MLJ 326, the Court of Appeal *inter alia* observed:

> [8] The concept of reasonableness flows through in all cases of judicial review. The test to succeed on reasonableness is high. For the appellate court to dwell on the issue of reasonableness, the applicant must demonstrate the decision of the inferior tribunal was so outrageous and it was also in defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question would have arrived at that conclusion (see *Md Nor bin Kassim v. Malayan Banking Bhd* [2017] 4 MLJ 71). **Thus, the test to intervene in the decision of a tribunal is extremely high when it is contrasted to the decision of a trial court in civil cases**. (emphasis added).

(ii) It is also well-established in cases of dishonesty of employee at senior management level, the threshold is low.

(iii) In cases of dishonesty, it is quite straightforward when it comes to dismissal. In cases of poor performance, it may become very technical and many issues may have to be considered and generally may also relate to market force and economic situation, etc.

A (iv) In cases of poor performance by employee, holding senior management level, the threshold is hybrid in nature and depends on the facts and circumstances of the case and falls within the realm of the Industrial Court itself to decide, taking into consideration just and equitable consideration as envisaged in the Act.

B (v) When the finding falls into the realm of the Industrial Court and the Industrial Court had taken into consideration, all the facts related to the dismissal, the High Court should be slow to intervene and quash the decision. The facts in this appeal amply meet that threshold and the High Court fell into error in intervening on quashing the decision of the C Industrial Court.

[8] For reasons stated above, after having considered the memorandum of appeal of the appellant in this case, at the High Court itself and the submission of the parties before us, we take the view that the decision of the Industrial Court ought not to have been disturbed.

D

[9] For reasons stated above, the appeal is allowed with costs subject to allocator. The decision of the High Court Judge is set aside. The decision of the Industrial Court is sustained.

We hereby order so.

E

F

G

H

I